

ENTERED
3-20-96 L.A.B.

FILED

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

96 MAR 20 AM 9:10
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

C/A No. 95-76086

Jerry W. Childers and
Shirley A. Childers,

JUDGMENT

Chapter 7

Debtors.

NationsBank's objection to the debtors' motion to value security is sustained. This Court's previous orders of January 19, 1996 and January 23, 1996 are hereby vacated and the value of the security of the claim of NationsBank is hereby set at Six Thousand One Hundred Sixty-Four and 61/100ths (\$6,164.61) Dollars.

Columbia, South Carolina,
March 19, 1996.


UNITED STATES BANKRUPTCY JUDGE

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IN RE:

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C/A No. 95-76086

U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Motion of the Debtors, Jerry W. Childers and Shirley A. Childers, ("Debtors"), to value the real property owned by them at 457 Feemster St., Rock Hill, South Carolina ("Home"). The Creditor, NationsBank, N.A. (Carolinas), ("NationsBank"), has a judgment lien which attaches to the Home and filed a timely Objection to the relief sought by the Debtors.

After hearing the arguments of counsel and making a careful review of the pleadings before the Court, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Jerry W. Childers and Shirley A. Childers filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code on November 1, 1995.
2. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§1334 and 11 U.S.C. § 506.
3. Ralph C. McCullough, II, the trustee of the estate, ("Trustee"), made a finding of no distribution on December 13, 1995.
4. The Trustee did not file an objection to the relief sought by NationsBank

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or the Debtors.

5. NationsBank obtained a judgment in State Court against the Debtors on September 11, 1995 in the amount of Sixteen Thousand Four Hundred Eighty-Seven and 53/100ths (\$16,487.53) Dollars. Pursuant to State law said judgment attaches to any real estate, owned by the Debtors in the counties where the judgment is indexed.

6. The value of the home contained in the Debtors' Motion is Fifty-Four Thousand and no/100ths (\$54,000.00) Dollars. NationsBank did not object to this value.

7. The Debtors' Statement of Intention filed in conjunction with their Petition states that the Debtors intend to retain possession of the Home. There was nothing more than mere speculation offered to show that the Debtors might sell the home.

8. The Trustee's finding of no distribution indicates a lack of value in the home for the benefit of the Chapter 7 estate.

9. NationsBank did not object to the Debtors' Motion to Avoid Liens pursuant to 11 U.S.C. § 522(f), and an Order granting the relief sought by that Motion was entered. Nothing in this Order shall be construed as to overrule or modify that Order avoiding NationsBank's judicial lien to the extent that the exemptions of the Debtors are impaired.

CONCLUSIONS OF LAW

I. OBJECTION TO VALUATION

The Debtors served their Motion to Value Security on NationsBank on December 7, 1995. Said Motion contained the following provisions concerning valuation of the Home:

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DEBTORS' VALUE FOR COLLATERAL: Secured Amount below.

\$	54,000.00	Value of Home (appraisal)
\$ -	37,835.39	Payoff on First Mortgage: Chemical Bank
\$ -	3,240.00	Estimated (6%) Brokerage fee on sale
\$ -	1,500.00	Estimated Trustee's fee on sale
\$ -	<u>10,000.00</u>	Exemption allowed in jointly-owned residence
\$	1,424.61	Total secured amount

NationsBank filed a timely Objection to the Debtors' Motion on December 22, 1995. The crux of that Objection was that due to the Debtors' intention to retain possession of the Home, they should not be allowed to deduct the hypothetical costs of sale contained in their Motion, specifically the estimated Trustee's fee and the estimated brokerage fee.

NationsBank served its Objection upon counsel for the Debtors' ("counsel") and the Trustee on December 22, 1995. However, due to clerical error, Counsel's zip code was listed as 29131-6106 in the letter serving NationsBank's Objection upon Counsel. Counsel's actual zip code is 29731-6106. This error caused the Objection to be received by Counsel on December 30, 1995.

Because of the misdirection of the Objection, Counsel served an "Affidavit of No Objection" on NationsBank on December 22, 1995. This Affidavit was received by NationsBank on December 27, 1995. NationsBank immediately submitted a letter to the Clerk of Court dated December 27, 1995 advising the Court of its filed Objection and

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requesting that a hearing be scheduled on said Objection.

This Court scheduled a Hearing on NationsBank's Objection for January 16, 1996. The Clerk's office shows that the Notice of Hearing was mailed to all parties. However, NationsBank denies ever receiving any Notice concerning the January 16 hearing, and due to its failure to appear relief was denied and two (2) duplicative Orders issued forth in favor of Childers. The first of these Orders was entered by this Court on January 19, 1996, said Order overruling NationsBank's Objection for lack of prosecution. The second Order issued by this Court also overruled NationsBank's Objection for lack of prosecution. However, this latter Order set the value of NationsBank's security at \$1,424.61 Dollars.

Upon receipt of these two (2) Orders, NationsBank timely moved before this Court asking the Court to alter or amend the rulings contained in both Orders. NationsBank's Motion filed on February 1, 1996 states that its legal counsel never received Notice of the January 16, 1996 Hearing. The Motion is supported by four (4) Affidavits from the staff and attorneys of the law firm representing NationsBank. Each states that they are responsible in some aspect of insuring that the mail is received and distributed to the proper parties and that important dates are calendared appropriately.

Counsel for the Debtors objected to NationsBank's Motion arguing, in pertinent part, that NationsBank had not complied with Local Rule 9014. Counsel argues that because of the erroneous zip code, he did not receive NationsBank's Objection until December 30, 1996.

This Court finds that NationsBank substantially complied with Local Rule 9014.

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The fact that Counsel for the Debtor may not have received the Objection until December 30, 1995 does not negate this fact that the Objection was timely filed. The zip code appears to be a clerical error in that only one (1) digit was wrong, and it does not appear to have been done for the purpose of deception or delay. Furthermore, there was no hearing scheduled at that time, so any prejudice to Counsel was minimal.

It is this Court's opinion that it is more appropriate to reach the merits of a case than to deny relief based on a technicality.

Therefore, because NationsBank's Objection is meritorious and timely filed, this Court finds that the inadvertent and clerical error involved in mailing the Objection to Debtors' Counsel is not fatal, and that the Orders dated January 19, 1996 and January 23, 1996 are hereby vacated.

II. VALUATION

With the two (2) prior Orders vacated, the Court must now determine what value to place on NationsBank's collateral. As discussed earlier, NationsBank argues that since the Debtors intend to retain the Home they should not be allowed to deduct the hypothetical costs of sale of said collateral. NationsBank relies on the reasoning contained in Brown and Company Securities Corp. v. Balbus (In re Balbus), 933 F2d 246 (4th Cir. 1991), Coker v. Sovran Equity Mortgage Corp. 973 F2d 258 (4th Cir. 1992), and this Court's Order entered March 9, 1995 in In re Coates, 180 B.R. 110 (Bkrcty. D.S.C. 1995). These cases hold that the disposition costs of hypothetical sale should not be deducted from the fair market value of the Debtors' property when determining the value of a creditor's interest in the property when the Debtors intend to retain possession

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of the collateral.

The Debtors argue that the three cases mentioned above involved cases under Chapter 13 of the Bankruptcy Code and are therefore not applicable to their Chapter 7 proceedings. The Court finds this argument unpersuasive and holds that the principles of Balbus, Coker, and Coates do apply in this instance and further, because the Debtors will retain possession, the costs of sale truly are hypothetical.

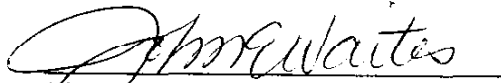
It is therefore the finding of this Court that when a debtor intends to retain collateral subject to a security interest held by a creditor, the hypothetical costs of sale should not be deducted when attempting to determine the value of the collateral.

In this proceeding, the ruling of this Court is that the Three Thousand Two Hundred Forty and no/100ths (\$3,240.00) Dollars denoted in the Debtors' Motion as estimated (6%) Brokerage fee on sale, and the One Thousand Five Hundred and no/100ths (\$1,500.00) Dollars denoted as estimated Trustee's fee on sale should not be deducted. Therefore, because there is no objection to the Fifty-Four Thousand and no/100ths (\$54,000.00) Dollars valuation placed on the Home itself, the secured amount of NationsBank judgment lien on the Home is hereby set at Six Thousand One Hundred Sixty-Four and 61/100ths (\$6,164.61) Dollars.

ACCORDINGLY, IT IS ORDERED, ADJUDGED, AND DECREED that NationsBank's Objection to the Debtors' Motion to value security is sustained.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the value of security of the claim of NationsBank is hereby set at Six Thousand One Hundred Sixty-Four and 61/100ths (\$6,164.61) Dollars.


JOHN E. WAITES
United States Bankruptcy Judge

Columbia, South Carolina

March 19, 1996.

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